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No. 83-1445

In the Supreme Court of the United States

OCTOBER TERM, 1983

RUSSELL HAMPSHIRE AND WALTER GERNERT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether transportation of videotape cassettes of pirated motion pictures may form the basis for a charge of interstate transportation of stolen property in violation of 18 U.S.C. 2314.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 715 F.2d 459. The memorandum opinion of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 1983. A petition for rehearing was denied on December 28, 1983 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on February 27, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial on a stipulated record in the United States District Court for the Central District of California,[1] petitioners were convicted of conspiring to

[1]The stipulated record before the district court included the following: Stipulation of Facts as supplemented (ER 1176-1191); transcripts of conversations and meetings between FBI agents and petitioners and

transport stolen goods in interstate commerce, in violation of 18 U.S.C. 371 and 2314 (Count One), and willfully infringing copyrights of motion pictures, in violation of 17 U.S.C. (1976 ed.) 506(a) (Count Four) (ER 1251, 1258).[2] Petitioner Hampshire was fined $2,500 on Count One and sentenced to concurrent three-year terms of probation on Counts One and Four (ER 1258). Petitioner Gernert was fined a total of $35,000 on Counts One and Four and sentenced to a one-year term of imprisonment on Count Four, suspended in favor of ten days' confinement and three years' probation (ER 1251).[3]

1. During the summer of 1977, the FBI established in Miami an undercover investigation into the national pornography industry. As part of this investigation, FBI agents

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their co-conspirators, recorded by the agents; transcripts of court-ordered wiretaps installed at TVX Distributors, which recorded conversations between the conspirators, and FBI summaries of these conversations (ER 1-1135). ("ER" refers to the Excerpt of Record filed in the court of appeals.)

Petitioners and others were indicted by a federal grand jury sitting in the Southern District of Florida. On the motion of petitioners and co-defendants John Belmont and Phillip Bernstene under Fed. R. Crim. P. 21(b), venue was transferred to the Central District of California.

[2]Pursuant to the stipulation of the parties (ER 1188, 1219), the government moved for dismissal of Counts Two, Three and Five at sentencing, and that motion was granted (ER 1257, Docket No. 136; ER 1264, Docket No. 136).

[3]Co-defendants Belmont and Bernstene also were convicted on Counts One and Four. The court of appeals affirmed their convictions (Pet. App. A1-A12), and this Court denied their petition for a writ of certiorari (*Belmont* v. *United States*, No. 83-769 (Feb. 21, 1984)). Co-defendants Timothy Burns, Bernard Avers, Edward Smoliak, and Gary Smoliak pleaded guilty to one count of copyright infringement, in violation of 17 U.S.C. (1976 ed.) 506(a); in addition, the Smoliaks each pleaded guilty to one count of conspiracy to transport videotape cassettes of pirated motion pictures in interstate commerce, in violation of 18 U.S.C. 371 and 2314.

Patrick Livingston and Bruce Ellavsky, posing as businessmen operating "Gold Coast Specialties, Inc.," purchased sexually explicit materials from various sources and pretended to distribute it. When the agents discovered in late 1978 that some of the sources were selling pirated motion pictures as well as pornography, they feigned interest in purchasing such pirated material.

On November 6, 1978, co-defendant Bernstene telephoned Livingston in Miami and advised that he and others were operating under the name Discount Distributors and were selling videotape cassettes of X-rated hard core pornographic films, as well as cassettes of major motion pictures (ER 1). In three subsequent recorded telephone conversations, Bernstene discussed with Livingston the possible purchase of videotape cassettes of major motion pictures (ER 3, 14, 28). Bernstene stated that he had at least ten video cassettes of motion pictures and mentioned titles including *Heaven Can Wait, Lawrence of Arabia, Saturday Night Fever*, and *Gone With the Wind* (ER 5, 7). Bernstene indicated that Al Nunes in Hawaii and co-conspirator Bernard Avers were his sources of pirated movies (ER 7, 29, 36, 37-38).

On January 23, 1979, the agents met with the conspirators, including both petitioners, at the offices of Discount Distributors, where the agents were shown a copy of *The Enforcer* on a videotape machine (ER 52, 144-148, 190). During the meeting, co-defendant Bernstene stated that he was still receiving "masters" from Al Nunes as a commission for putting Livingston in contact with Nunes (ER 70-72). In addition, Bernstene said he intended to visit a potential source "in the valley," a collector who had a large library of motion pictures (ER 57-58, 65, 68-69, 70). Co-conspirator Avers stated that he, too, had provided masters of current motion pictures and could supply others, including *Star Wars, Superman*, and several Walt Disney titles

(ER 148-149, 166, 176, 182). Petitioners were present throughout the meeting. They played some part in the conversations (ER 53, 64, 87, 155), which involved extensive discussion about pirated motion pictures, "sources" of masters in the industry, and duplication techniques for producing "quality" products.

On February 6, 1979, Agent Livingston placed an order with co-defendant Bernstene for 142 videotape cassettes of 11 motion pictures. They agreed on a total purchase price of $7,100, and Bernstene directed that the check be made payable to Discount Distributors. ER 204, 220-223. The videotape cassettes filling that order were shipped by Discount Distributors or TVX Distributors in Los Angeles and were received by Gold Coast Specialties over a three-month period (ER 247-248, 258, 294-295, 336-338).

Livingston later learned that Bernstene and co-conspirator Timothy Burns were no longer partners and that petitioners were working with Bernstene at Discount Distributors (ER 261, 264, 270). In April 1979, Bernstene notified Livingston that he was leaving Discount Distributors in order to join TVX Distributors. Petitioners, his former partners, were to remain and operate on their own as Video Club of America (VCA). ER 284-285, 287.

On May 31, 1979, Livingston and co-defendant Bernstene met in a Marina del Rey hotel room, where Livingston negotiated a second order for 150 cassettes of ten motion pictures, including *China Syndrome*, *Manhattan*, and *Grease* (ER 339-341, 343, 380-383, 385-386). During this meeting, Bernstene stated that someone from a studio was a new source for motion picture masters (ER 350). In two subsequent telephone conversations, Bernstene indicated that he had another operation in Minneapolis that was making duplicates for him and that Livingston would receive some shipments from that source (ER 428, 440,

441-442). On July 17, 1979, Livingston picked up a shipment of 19 videotape cassettes of *The Exorcist* and *Grease* sent to Gold Coast from Minneapolis Audio. A handwritten note stating "From Chuck Bernstene" was on the packing list. ER 488.

On August 2, 1979, Livingston spoke to petitioner Hampshire at VCA. Hampshire stated that approximately 100 cassettes for Livingston had been shipped the day before by UPS Air at Bernstene's direction. Hampshire said that the quality of all the cassettes was good, and he confirmed that *Rocky II* had been substituted in the shipment. ER 522-525. Hampshire reported that he and petitioner Gernert were operating on their own (ER 523, 524, 525-528). Hampshire also remarked on the inferior quality of the tapes produced by Minneapolis Audio, compared with VCA's videotapes (ER 524). On August 8, 1979, Agent Ellavsky picked up from UPS Air a shipment of 105 videotape cassettes of six motion pictures, including *Rocky II*, that had been sent to Gold Coast from VCA (ER 531-533).

On October 13, 1979, Livingston and Bernstene began negotiating their final transaction. They initially agreed that Livingston would pay $6,400 in two installments for 120 cassettes. ER 615, 620-621. At an October 29, 1979, meeting in Las Vegas, the order was revised upward to include more cassettes for a total of $7,500 (ER 713-714, 726, 728). During that meeting, Livingston wrote a check for $3,750, half of the total cost, and Bernstene delivered to Livingston a package containing 15 cassettes of the movie *The Onion Field* (ER 714, 715, 727, 728).

During an October 25, 1979, conversation with petitioner Gernert, Bernstene stated that the two would have to go over their books of account carefully to determine what Gernert owed Bernstene because petitioner Hampshire had not been careful about what stock received from "J" (co-defendant Belmont) should be credited to Bernstene or to

others; Gernert was sure Belmont had been paid in full, but thought he owed Bernstene about $9,000 (ER 660, 667-671). On November 2, 1979, Bernstene conferred with Gernert about a dispute that had arisen between Gernert and Belmont over work assignments (ER 746-748); later that day Gernert said he would make the cassettes of the "Disney things" and that Bernstene should not have "J" do them (ER 751-752). On November 7, 1979, Gernert and Belmont discussed comparing two "master" tapes of *The Muppets* to decide which should be used for making cassettes (ER 785-787). The following day, Belmont told Bernstene that he thought petitioner Hampshire was the source of the "talking in your place" and that Bernstene should not let Hampshire listen to anything "[b]ecause he is a danger for you" (ER 793).

Livingston met Belmont at a meeting on January 8, 1980, at which Bernstene introduced Belmont as his "source" of major motion pictures (ER 871). Belmont stated that he had acquired a good master of the movie *Star Trek* and that he could supply Livingston with cassettes of the movie within a few days. Belmont indicated that he had several "sources" of motion pictures and that one was an individual who delivered movies to theaters in the Los Angeles area. ER 876.

On February 14, 1980, Belmont was arrested at his place of business (ER 1118). A search of the premises, pursuant to a warrant, revealed a set-up of 18 recorders connected so that an operator could reproduce simultaneously 16 videotape cassettes from a "master" cassette (ER 1115). Agents seized over 30 video cassette recorders, over 85 cassettes of 50 motion pictures, invoices from VCA and TVX Distributors, and three books on copyrights (ER 1119-1133).

2. On appeal, petitioners challenged their convictions on the ground, inter alia, that transportation of unauthorized videotape cassettes of copyrighted movies does not constitute an offense under 18 U.S.C. 2314. Relying on its own prior decision in a similar case of movie piracy, *United States* v. *Drebin*, 557 F.2d 1316, 1332 (9th Cir. 1977), cert. denied, 436 U.S. 904 (1978), the court of appeals rejected petitioners' contention (Pet. App. A4-A9). The court declined to follow *United States* v. *Smith*, 686 F.2d 234 (1982), in which the Fifth Circuit found Section 2314 inapplicable to transportation of videotape cassettes in a case in which the original copying was "off the air" (Pet. App. A6-A7). The court of appeals concluded that the evil at which Section 2314 is aimed is interstate traffic in stolen property and that the "rights of copyright owners in their protected property are just as deserving of protection from interstate transportation as are the ownership interests of those who own other types of property" (Pet. App. A6 (footnote omitted)). The court also concluded (*id.* at A7-A8) that the legislative history of the Copyright Act of 1976, 17 U.S.C. (1976 ed.) 101 *et seq.*, and its amendments did not indicate any intent to limit the scope of Section 2314.[4] On the contrary, the court found evidence in the 1982 amendments supporting the application of Section 2314 to transportation of copies of unauthorized copyrighted material (Pet. App. A8). The court of appeals concluded further (*ibid.*) that interpretation of the copyright statute as an implied repeal of Section 2314's application to a case like this one would violate the "cardinal principle of construction that repeals by implication are not favored."

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[4]The Piracy and Counterfeiting Amendments Act of 1982, Pub. L. No. 97-180, 96 Stat. 91 *et seq.*, amended 17 U.S.C. 506(a) and 18 U.S.C. 2318 and added 18 U.S.C. 2319. These amendments, which increased the penalties for willful copyright infringement, did not become effective until May 24, 1982, after the commission of the offenses charged in the indictment. Petitioners were charged and sentenced under the prior version of 17 U.S.C. 506(a).

The court of appeals also rejected petitioner Hampshire's claim that the evidence was insufficient to support his conspiracy conviction (Pet. App. A10) and the contention of both petitioners that the government had failed to show the absence of a first sale (*id.* at A9) and to prove that the value of the tapes amounted to $5,000 (*id.* at A9-A10). The court dismissed as "frivolous" petitioners' argument that, because the parties had agreed that the Stipulation of Facts would constitute the record on which the district court would determine the petitioners' guilt on Counts One "and/or" Four, the rule of lenity required the district court to render judgment on Count Four only (ER 1187-1188; Appellants' Consolidated Opening Br. 23) (Pet. App. A10-A11).

ARGUMENT

Petitioners contend (Pet. 7-11) that the court of appeals' holding that transportation of unauthorized videotapes may constitute a violation of 18 U.S.C. 2314 conflicts with the Fifth Circuit's decision in *United States* v. *Smith*, 686 F.2d 234 (1982). This Court recently denied a petition for a writ of certiorari in which petitioners' co-defendants Belmont and Bernstene raised the identical claim. *Belmont* v. *United States*, No. 83-769 (Feb. 21, 1984). In addition, the Court previously denied certiorari in another case that arose out of the same Miami-based FBI investigation, and that raised the same issue. *Gottesman* v. *United States*, No. 82-5852 (Feb. 28, 1983). This case presents no new reason that would call for a different result. We refer the Court to our Briefs in Opposition in *Belmont* and *Gottesman* for a discussion of why review is not warranted.[5]

As we explained in our Brief in Opposition in *Belmont*, there is no irreconcilable conflict between *Smith* and this case. The evidence in this case indicates that the pirated

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[5]We are providing petitioners' counsel with copies of those briefs.

cassettes were made from master tapes, rather than recorded "off the air" (*i.e.*, from broadcast signals), as in *Smith*.[6] The court in Smith acknowledged that a situation like the instant one would be distinguishable from the case before it. See 686 F.2d at 243-244 n.17. See also *United States* v. *Gottesman*, 724 F.2d 1517, 1520 n.1 (11th Cir. 1984). In addition, as we pointed out in our Brief in Opposition in *Belmont* (at 9-10), any conflict with *Smith* would be of considerably diminished significance as a result of the passage of the Piracy and Counterfeiting Amendments Act of 1982, Pub. L. No. 97-180, 96 Stat. 91 *et seq.*, codified at 17 U.S.C. 506(a) and 18 U.S.C. 2318, 2319.[7]

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[6]The court of appeals' statement that the copying in this case was "off the air" (Pet. App. A6) appears to be without foundation in the record and may reflect some misunderstanding of that term. See our Brief in Opposition in *Belmont* at 9 n.7.

[7]Petitioners err in contending (Pet. 11) that the court of appeals failed to discuss the rule of lenity. The court squarely rejected the contention petitioners made on the basis of the rule of lenity (see page 8, *supra*). Petitioners did not raise in the court of appeals the rule of lenity argument they now make. Thus, that argument is not properly raised in this Court. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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